

Elizabeth Key, Seventeenth-Century Virginia (US)

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Given the evolving notions of racial difference and states of unfreedom, identity in seventeenth-century colonial Virginia was in a liminal state. Enter Elizabeth Key, an African-Anglo woman living in the colony during the middle of the seventeenth century. Key sued for her freedom when the overseers of her late owner's estate classified her in the estate inventory as a "negro," as opposed to a "servant." To the overseers the term "negro" implied a permanently or perpetually unfree person, an inheritable condition. In contrast, the term "servant" implied someone born free who voluntarily relinquished her freedom for a definite period. Thus, Key's classification raised serious questions about her legal status and the status of at least one of her two children. Hers is one of the earliest freedom suits in the English colonies filed by a person with some African ancestry. Her representative argued that, because her father was an English subject, she could not be enslaved for life. Unfortunately, a negative consequence of her successful lawsuit was a law consigning the children of enslaved women to permanent servitude.¹

At the time of her lawsuit Elizabeth lived in the household of John Mottrom at the outskirts of the English Virginia Colony on the Coan River in Northumberland County, the outermost part of tidewater country where slithers of land divided like fingers by small and great rivers like the Potomac, Rappahannock, York, and James (see Figure 4.1). During

¹ This essay is based on a longer article discussing the Elizabeth Key litigation, Taunya Lovell Banks, "Dangerous Woman: Elizabeth Key's Freedom Suit – Subjecthood and Racialized Identity in Seventeenth Century Colonial Virginia," *Akron Law Review* 41, no. 3 (2008).



FIGURE 4.1 The Chesapeake, circa 1670

This detail of a map of the Chesapeake highlights three places related to Elizabeth Key: Blunt Point (now Newport News) where she was born to Thomas Key and an unnamed enslaved woman; the site of Coan Hall, Northumberland County, where Elizabeth lived as a slave until she filed her freedom suit; Jamestown, the site of her appeal to the Virginia General Assembly.

Source: Augustine Herrman. "Virginia and Maryland as it is planted and inhabited this present year 1670." London: John Seller, hydrographer to the King, 1673. Courtesy of the John Carter Brown Library.

the early 1640s English settlers shared this land uneasily with members of the Powhatan Confederation. But, unlike communities further south, Northumberland, through the skillful leadership of early settlers, like John Mottrom, avoided the lethal battles with the Confederation such as those that took place in 1622 and 1644. Today, the county is a remote suburb of Washington, DC, 120 miles to the northeast, and Richmond, 70 miles to the east, its farmland being developed into housing for retirees from the nation's capital.

Elizabeth's owner was a wealthy merchant and the chief judge of Northumberland County. Mottrom's household consisted of fifteen persons including eleven servants. Like most settlers, they lived modestly in cramped wood framed Virginia houses with one to three rooms and a loft. Undoubtedly, Mottrom's home was slightly larger than the average colonist. Servants, like Elizabeth, usually slept in the upstairs chamber or the loft. If lucky they might sleep on a mattress filled with straw, if not they slept on the hard floor. We can only speculate on what Elizabeth slept with her son in a household of fifteen people and only nine bedsteads, although a feather mattress (valued at 90s or £4 10s) was among the items found in the loft (see Figure 4.2).²

Like most people in the colony, Elizabeth was unfree. She was one of a small but growing number of women born into the former bachelor colony. Throughout most of the seventeenth-century English indentured servants comprised "eighty percent" of all emigrants, voluntary and involuntary, to the Chesapeake region (Virginia and Maryland).³ In the

² Inventory of the Estate of John Mottrom, Northumberland County Record Book, 1652–1658, 98. Library of Virginia, Richmond. For a description of the house and furnishings, see Barbara J. Heath, Dennis J. Pogue, and Eric G. Schweikart, "The Architecture of John Mottram's Coan Hall," *The Bulletin of the Northumberland County Historical Society* LIV (2017). On housing in early Virginia, see Cary Carson, "Plantation Housing," in *The Chesapeake House*, edited by Cary Carson and Carl Lounsbury (Chapel Hill: University of North Carolina Press, 2013); Mechal Sobel, *The World They Made Together: Black and White Values in Eighteenth-Century Virginia* (Princeton: Princeton University Press, 1987), 100–3; Dell Upton, "Vernacular Domestic Architecture in Eighteenth-Century Virginia," *Winterthur Portfolio* 17, no. 2/3 (1982); Warren M. Billings, ed., *The Old Dominion in the Seventeenth Century: A Documentary History of Virginia, 1606–1689* (Chapel Hill: University of North Carolina Press, 1975), 388–98.

³ Thomas Benjamin, *The Atlantic World: Europeans, Africans, Indians and Their Shared History 1400–1900* (New York: Cambridge University Press, 2009), 399.

Coan Hall 44NB11

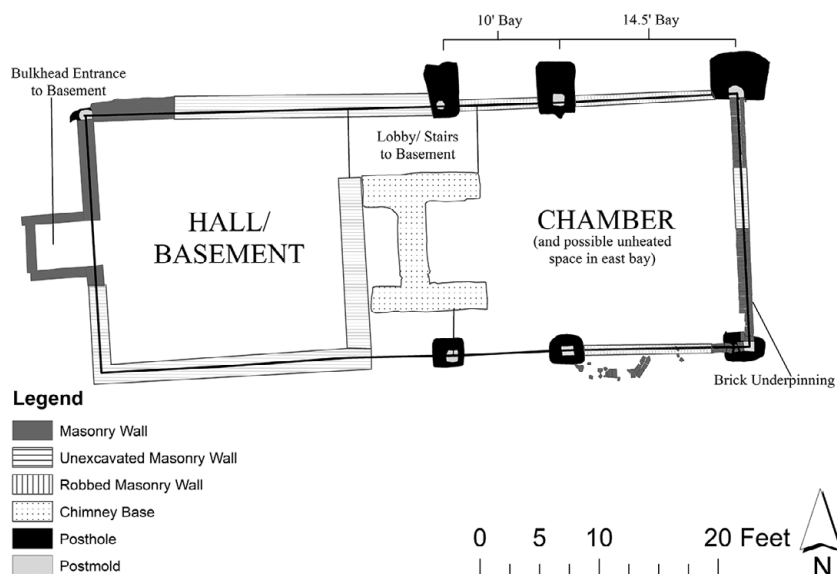


FIGURE 4.2 Manor house of Coan Hall, Northumberland County, Virginia, circa 1655

This plan of the manor house of Coan Hall, based on archaeological evidence, shows that Mottrom used its construction as a vehicle through which to showcase his rising political stature in the colony, as it was substantially larger than other houses found in Virginia in this period. According to the inventories, Elizabeth Key and her son slept in the parson's room, above either the chamber or the hall and below the loft.⁴

Source: Plan drawn by Eric Schweickart. Courtesy of and used by permission of Eric Schweickart, Barbara Heath, the Department of Anthropology at the University of Tennessee, Knoxville, and *The Bulletin of the Northumberland County Historical Society*.⁵

mid-seventeenth century Africans and their descendants comprised a small number of people in the colony. Although the slave status of these Africans had not yet been codified in Virginia law, Elizabeth clearly thought of herself as an indentured servant, a temporarily unfree person.

⁴ Heath et al., 2017, 8, 18.

⁵ For assistance with obtaining images and permission to use illustrations of Coan Hall, thanks to: Barbara Heath, Professor of Anthropology and Associate Head, Department of Anthropology, University of Tennessee, Knoxville; Eric George Schweickart, PhD Candidate, University of Tennessee; and Thomas Wolf, Editor, *Bulletin of the Northumberland Historical Society*.

Elizabeth Key's fortunes changed in 1655, when Mottrom died and left an estate valued at 33,896 pounds of tobacco, the coin of the realm in the colony, or the equivalent of a little over 13,558 English pounds (a little more than two million pounds in 2018).⁶ The estate inventory listed two classes of unfree persons – six male “servants” and five “negroes.” Elizabeth Key, her infant son, two adult males, and one other adult female were listed as “negroes.” The remaining term of service, ranging from two to eleven years, was listed for each servant, but nothing appeared next to people classified as “negroes.” At a time when there were no more than 300 African-descended people in the whole colony, John Mottrom possessed 5.⁷

Elizabeth's classification in the inventory as a “negro” meant that the estate overseers considered her permanently enslaved, and that her status was inherited by her son. While the psychological impact of being enslaved for life was severe, the actual difference between the lives of enslaved and most indentured servants during this period could be minimal. They performed the same unpaid work, and, given the harsh conditions in the early colony, many servants died before their term of service ended. For them, service in Virginia was for life. For enslaved women, however, the likelihood that your children would also be slaves was surely worth fighting against. Thus, Elizabeth, with the assistance of William Grinstead, a former English indentured servant, the father of her son, and the man who she would eventually marry, sued for their freedom.⁸ It is through this lawsuit that we get closest to Elizabeth's world, for people in early America expressed themselves in “court records more openly than through almost any other set of documents.”⁹

Elizabeth Key's decision to secure her freedom, and her navigation through the Virginia courts, suggests a fluency with the legal system not generally attributed to seventeenth-century Africans and their descendants in Virginia. But Atlantic creoles, persons of African descent who lived

⁶ In the seventeenth century there were two tobaccos: Spanish and Virginia. Tobacco was 8s per pound in 1655 and, assuming the tobacco being valued is Virginian, the total value is 271,168 shillings or £13,558 8s (20 shillings per old pound). James E. T. Rogers, *A history of Agriculture and Prices in England*, edited by Arthur G. L. Rogers, vol. 5 (Oxford: Clarendon Press, 1887), 467. The website *Measuring Worth* provides a calculator for the relative value of the British pound over time. In 2018, the relative value of £13,558 8s from 1655 is £2,522,000.

⁷ Inventory of the Estate of J. N. O. Mottrom, Northumberland County Record Book, 1652–1658: 98. Library of Virginia, Richmond.

⁸ Billings, 1975, 166.

⁹ Cornelia Hughes Dayton, *Women before the Bar: Gender, Law and Society in Connecticut* (Chapel Hill: University of North Carolina Press, 1995), 4.

during the colonial period, understood the society in which they found themselves and used this knowledge to their own advantage.¹⁰ This was especially true for Elizabeth who, as a member of the Mottrom household, must have witnessed many cases heard by Chief Judge Mottrom. It remained to be seen whether she would get justice from this legal system. During the seventeenth century the colonial courts could not always be counted on to render justice, especially for unfree or poor litigants.

Lawsuits filed by unfree persons in British North America seeking freedom from their masters or owners were called freedom suits. The essence of a freedom suit claim is that the suing party is being held in servitude unlawfully by the defendant. Today freedom suits like the infamous Dred Scott case are most often associated with black Americans who challenged their enslavement during the eighteenth and early nineteenth century. But English indentured servants brought the bulk of seventeenth-century freedom suits in the American colonies. Freedom suits were not uncommon in seventeenth-century colonial Virginia. Since the life of an indentured servant in the Colony was harsh, few servants would continue to work voluntarily after their term of service expired. This is especially true since indentured servants in the Virginia colony, unlike most of their English counterparts, received no wages and served longer terms. Colonial magistrates willingly heard these suits, and over three quarters of the indentured servants suing in the Chesapeake area (Maryland and Virginia) during the seventeenth century won their cases. In contrast, servants in the New England colony were less likely to secure their freedom.¹¹

ELIZABETH'S LEGAL STATUS WITHIN THE COLONY

Elizabeth's freedom suit was slightly different from the freedom suits brought by most indentured servants during this period. Those servants were presumed to be free at birth and sued claiming that their freedom was being wrongfully withheld. It was Elizabeth's partial African ancestry

¹⁰ Ira Berlin, "From Creole to African: Atlantic Creoles and the Origins of African-American Society in Mainland North America," *William and Mary Quarterly* 53, no. 2 (1996): 251, 278.

¹¹ Between 1652–1797 in Maryland, upwards of 83 percent of servants who brought their complaints to magistrates or county or provincial courts won their cases, see tables 2–3 in Christine Daniels, "‘Liberty to Complaine’: Servant Petitions in Maryland, 1652–1697," in *The Many Legalities of Early America*, edited by Christopher Tomlins and Bruce H. Mann (Chapel Hill: University of North Carolina Press, 2001), 229–30.

that impacted her status at birth and that was at question in her lawsuit. Her father, Thomas Key, was an early English settler who arrived in the colony as an indentured servant in 1619. By the time of Elizabeth's birth in 1630, Key had survived his servitude, owned property in Blunt Point (today Newport News), and was a member of the colonial legislature. His reputation suffered, however, when, as a married man, he fathered Elizabeth with his unnamed "negro woman" and was fined by the local court.¹²

When she was six, Thomas transferred his daughter Elizabeth to Humphrey Higginson, reputedly her godfather, and among the wealthiest and most influential English settlers in the colony in the 1640s. When Higginson returned to England for good in the 1650s, Elizabeth ended up in the Mottrom household. Her transfer from one household to another was not unusual. Whether enslaved or indentured, unfree members of the Virginia colony had no control over such transfers. The question at her trial was whether she was entitled to her freedom.¹³

THE TRIAL

Elizabeth Key's case against the Mottrom estate was heard before a jury in the Northumberland County Court on January 20, 1655/56.¹⁴ At her trial, Elizabeth and her representative (and soon to be husband) Grinstead, made two interrelated arguments: first, that she was born free because as the child of an English father she could not be enslaved under English law; and second, she was an indentured servant whose term of service had long expired. The Mottrom estate first challenged her claim that Thomas Key was her father. Elizabeth's claim, however, was

¹² H. R. McIlwaine, ed., *Journals of the House of Burgesses of Virginia, 1619–1658/59* (Richmond: Colonial Press, 1915), xi; Billings, 1975, 166.

¹³ Philip A. Bruce, *Institutional History of Virginia in the Seventeenth Century* (New York: G. P. Putnam's Sons, 1910), 2: 382 n.2; "The Randolph Manuscript: Virginia Seventeenth Century Records," *The Virginia Magazine of History and Biography* 17, no. 3 (1909): 128 n.6; "Bernard Family," *William and Mary Quarterly* 5, no. 3 (1897): 186 n.3. Humphrey Higginson was a member of the Virginia Council from 1642–1655. Bruce, characterizes Council members as "invariably" among "the wealthiest ... and most influential" settlers in the colony. Bruce, 1910, 2: 358.

¹⁴ Until 1752 the Virginia colony used the Julian calendar and the Gregorian calendar. Since under the Julian calendar the New Year started March 25th, any event that occurred between January 1 and March 25 was indicated using two years. Virginia M. Meyer and John F. Dorman, *Adventurers of Purse and Person, Virginia, 1607–1624/5*, 3rd ed. (Baltimore, MD: Genealogical Publishing Company, 1987), xxiii.

supported by testimony from a former servant in the Key household. Other witnesses testified that her paternity was acknowledged by members of the Mottrom household. According to one old former servant, when Thomas Key's son John referred to Elizabeth as "Black Bess" he was admonished "to call her sister, which he did."¹⁵ Elizabeth also claimed that as a Christian she could not be enslaved.

A related legal question was whether, as the child of Thomas Key, Elizabeth's partial English ancestry made her an English subject and thus born free. Because English colonization called into questions traditional notions of how subjecthood attached,¹⁶ in 1606, a year before the colony was founded, King James issued the first charter to the Virginia Company which contained the following declaration:

[A]ll and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions.¹⁷

Children born to English settlers in the colony were considered English subjects.

The Charter's declaration, however, does not clarify whether to become an English subject at birth requires that both parents be English subjects, or whether English subjecthood attaches if the child's father is English; if either parent is English; or if a child's father is English but the mother is an unmarried alien and unfree. Around 1619 captive immigrants of African descent were forcibly brought to the colony. While the law did not define Africans as slaves, most were treated as such in practice.¹⁸ The existence of African slavery was known throughout the Atlantic world, which explains the debasement of black people by most white people.¹⁹ Spanish and Portuguese law stated directly that the status

¹⁵ Billings, 1975, 166.

¹⁶ Liên Luu, "Natural-born versus Stranger-born Subjects: Aliens and Their Status in Elizabethan London," in *Immigrants in Tudor and Early Stuart England*, edited by Nigel Goose and Liên Luu (Brighton: Sussex Academic Press, 2005), 59.

¹⁷ William W. Hening, *The Statutes at Large; Being a Collection of All the Laws of Virginia*, 13 vols. (New York: R. & W. & G. Bartow, 1823), IV: 57–66.

¹⁸ Ira Berlin, *Many Thousands Gone: The First Two Centuries of Slavery in North America* (Cambridge: Harvard University Press, 1998), 41.

¹⁹ *Ibid.*, 38.

of the child descended from the mother, a model that was clearly used in Virginia, as Elizabeth's case demonstrates, before it was adopted as a statute. Still, the legal status of someone like Elizabeth, the child of an English father and a "negro woman," who may or may not have been enslaved, was unclear.

Elizabeth alleged that she entered the Higginson household as an indentured servant who was to be freed when she turned fifteen.²⁰ This was not an unusual arrangement. During this period the fathers of children born outside of marriage were responsible for their child's upkeep. As a result, some fathers placed their "bastard" children into servitude to fulfill their responsibility. At the trial several witnesses testified to Elizabeth's ambiguous status as an unfree laborer, citing the terms of a legal agreement between Thomas Key and Higginson. According to their testimony, the arrangement provided that, in exchange for food and clothing, Elizabeth, a "Negro Girle," was being put in Higginson's care for nine years. The bargain provided that if Higginson left permanently for England before the nine-year term expired, he should take Elizabeth with him at his own expense, and not give her to anyone else. If Higginson died before the end of the nine-year term Elizabeth should be freed. Tellingly, according to witnesses, Higginson promised Key to use "Bess a Molletto . . . as well as if shee were his own Child."²¹ It is significant that these witnesses used the terms "negro" and "mulatto" interchangeably, suggesting the instability of these terms in defining the nature of a person's legal status as free or unfree.

Unfortunately, the whereabouts of the actual agreement are unknown. All that is left is what the record says about the agreement. Without the agreement several questions arise: was the agreement an indenture contract or a manumission agreement? If the former, the document was evidence of Thomas Key's intent to place Elizabeth in temporary servitude, creating a presumption that he viewed her as a free person. On the other hand, if Thomas Key intended to manumit Elizabeth in nine years, that interpretation supports claims of the Mottrom estate that Key considered Elizabeth unfree at birth.²²

²⁰ Testimony of Anthony Lenton. Billings, 1975, 166.

²¹ Testimony of Anne Clark. *Ibid.*, 165–67. Clark testified that she was present when Higginson and Thomas Key signed an agreement witnessed by her deceased husband. Having witnessed only the signing, she did not necessarily have first-hand knowledge of the agreement's terms and was uncertain whether the document specified that Elizabeth was to be given her freedom when her term expired.

²² *Ibid.*, 165, 169.

Whether Elizabeth was a servant or enslaved, Higginson's failure to honor the terms of his agreement with Thomas Key was not unusual. For this very reason a 1643 Virginia colonial law required registration of indenture contracts to prevent masters from holding servants beyond their agreed term of service.²³ Elizabeth's father, understanding the unscrupulousness of his fellow colonialists and possibly also the uncertainty of her legal status, tried to protect his daughter from the cruelties of American indenture as well as possible enslavement by creating a witnessed written document. It is unlikely, however, that Thomas, pursuant to this law, registered Elizabeth's contract. The agreement was made around 1636, before the 1643 law, and it is believed that Thomas Key was killed around 1644 during an Indian raid. It is unclear how Elizabeth gained access to the contents of this document.

After hearing all the evidence, the county court jury, a relatively recent addition to Virginia's legal system,²⁴ found that Elizabeth's father was Thomas Key, a free Englishman. They also found, as a matter of fact, that Key bound Elizabeth to Higginson for a nine-year term which had expired. Based on the jury's factual findings, the County Court judge ruled that Elizabeth ought to be freed.²⁵ The Mottrom estate overseers appealed this decision to the General Court.²⁶

THE APPEAL

The appeal of Elizabeth's case was heard at the March 1655/1656 session of the General Court. The actual court record was destroyed by fire in 1865, and the only existing records of the General Court proceeding are the notes of Conway Robinson. Robinson reports only that "a mulatto

²³ Warren Billings writes, "[r]equiring the recordation of indentures and servants' ages guarded against the unscrupulous owner who might try to extend the time of bondage." Warren M. Billings, "The Law of Servants and Slaves in Seventeenth-Century Virginia," *The Virginia Magazine of History and Biography* 99, no. 1 (1991): 51. However, Alden Vaughan argues that the 1643 statute only applied to English servants and did not apply to persons of African ancestry, citing a subsequent 1655 statute, imposing longer terms for Irish than English servants, which stated that the 1643 statute was "only [for] the benefit of our own nation." Alden T. Vaughan, "The Origins Debate: Slavery and Racism in Seventeenth-Century Virginia," *The Virginia Magazine of History and Biography* 97, no. 3 (1989): 340 n.87.

²⁴ Warren M. Billings, "Pleading, Procedure, and Practice: The Meaning of Due Process of Law in Seventeenth-Century Virginia," *The Journal of Southern History* 47, no. 4 (1981): 569, 575, 581.

²⁵ Billings, 1975, 165. ²⁶ *Ibid.*

held to be a slave and appeal taken.” In other words, the General Court reversed the trial court decision concluding that Elizabeth was a slave, and she appealed to the General Assembly. Until 1680 the General Assembly was both the legislative body and the highest appellate court in the Virginia colony.²⁷

Upon receipt of Elizabeth’s petition, the General Assembly appointed a committee of Burgesses to investigate the matter. The Committee report noted that Thomas Key imposed several conditions when he transferred possession of six-year-old Elizabeth to Humphrey Higginson. First, Key stipulated that Higginson was to use Elizabeth for nine years. Second, and perhaps more importantly, according to the Committee, Key stipulated that Higginson was to use Elizabeth “more respectfully than a Common servant or a slave.”²⁸ In essence the Committee determined that Thomas Key wanted Higginson to treat Elizabeth like an indentured woman in England where service was considerably milder than in the colony.²⁹ Upon receipt of the Committee’s report, the General Assembly concluded: “Elizabeth ought to bee free and that her last Master should give her Corne and Cloathes and give her satisfaction for the time shee hath served longer then Shee ought to have done.”³⁰ No further explanation was provided for this decision.

We are left to speculate on the factors that influenced the General Assembly to rule in Elizabeth’s favor; no existing records indicate the nature of the Committee’s investigation, and the report essentially upholds the decision of the County Court.³¹ The Committee’s decision, for example, side-stepped the larger legal question of whether Elizabeth was

²⁷ Warren M. Billings, “The Case of Fernando and Elizabeth Key: A Note on the Status of Blacks in Seventeenth-Century Virginia,” *William and Mary Quarterly* 30, no. 3 (1973): 469 n.3. Conway Robinson was the founder of the Virginia Historical Society and lived from 1805–1884. He also worked as a lawyer, author, and Clerk of the General Court from 1828–1831. He made copies of the colonial court records whose originals were later destroyed in a fire during the Civil War. Virginius Cornick Hall, *Portraits in the Collection of Virginia Historical Society: A Catalog* (Charlottesville: University Press of Virginia, 1981), 215; George L. Chumbley, *Colonial Justice in Virginia: The Development of a Judicial System, Typical Laws and Cases of the Period* (Richmond: Dietz Press, 1938), 5; H. R. McIlwaine, ed., *Minutes of the Council and General Court of Colonial Virginia 1622–1632, 1670–1676* (Richmond: Colonial Press, 1924), 504; Bruce, 1910, 1: 682; Percy S. Flippin, *The Royal Government in Virginia 1624–1775*, *Studies in History, Economics, and Public Law* (New York: Columbia University, 1919), 307.

²⁸ Flippin, 1919, 307.

²⁹ Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (New York: W. W. Norton, 1975), 127.

³⁰ Billings, 1975, 167. ³¹ Ibid.

an English subject at birth and free born. It is possible that the Committee set Elizabeth free without linking her freedom to her free English father. As mentioned previously, Thomas Key might have considered Elizabeth a slave when she was born and decided to free her when she turned fifteen. There are several examples in seventeenth-century Virginia of African-descended people being freed by slaveholders, but usually upon their death.³² If this was the Committee's thinking, then the arrangement between Thomas Key and Humphrey Higginson could be considered a manumission agreement. By interpreting the document this way, Elizabeth, if not freeborn, would be an alien and would have to apply to become a denizen or subject of England through naturalization.

The legislative response to the General Assembly's decision in Elizabeth's care was fairly swift and carried devastating ramifications for women of African descent, and these would last until the ratification of the Thirteenth Amendment to the US Constitution in 1865. In 1662 the colonial legislative body resolved the question about the legal status of Afro-English children, in a statute that stipulated that the status of the child follows that of the mother (*partus sequitur ventrem*).³³ Arguably the General Assembly wanted to reaffirm that only children of unmarried English women were English subjects. Much to the dismay of colony leaders, the number of children in the colony being born outside of marriage was increasing. Out-of-wedlock sex and pregnancy was common in early Virginia. Given the shortage of English women in the Virginia colony, and the large number of single young English men, bound and free, illicit sexual intercourse with Indian and the few black women was not uncommon.³⁴ Mixed-race offspring were a natural byproduct of these sexual unions. Making children born outside of marriage to unfree mothers free at birth and, more importantly English subjects, could create problems for those who owned the women or the women's labor, as they would have been most concerned about the cost of rearing the children.

There is another explanation for the law. The 1662 statute reflects a fear that free English men might wrongfully be named as the fathers of

³² For example, see the York County Order Book, 1657–62, which explains that Mihill Gowen, the “negro” servant, who in 1657/58, was freed, along with his son, in the will of slaveholder Robert Stafford. There also was a “negro” couple, John and Isabell Daule who were freed in 1670 by will of Arthur Jordan. *Ibid.*, 164–65.

³³ Act XII of 1661, see Hening, 1823, 2: 170. ³⁴ Morgan, 1975, 336.

Afro-English “bastard” children.³⁵ In theory, prior to the statute, a pregnant enslaved black woman could name the father of her child in court to obtain financial support (and possibly freedom) for her child, a device that the 1662 statute removed.³⁶ The possibility of an embarrassing, and costly, lawsuit may have theoretically offered some protection for vulnerable enslaved women from would-be seducers or rapists. Between 1657 and 1662 the General Assembly made significant changes to the bastardy laws, relaxing the penalties assessed on fathers. A 1661 statute removed the penalties owed the woman’s master, leaving the punitive father responsible only for the costs of keeping the child.³⁷ In addition, both the 1661 and 1662 statutes clarifying the bastardy law refer to the men as the “reputed” father, signaling the onset of a double standard by which women were held more responsible than men for sexual offenses.

The 1662 law also placed double fines on interracial sex. Working from this premise it was also necessary to enact anti-miscegenation laws designed, initially, to prevent English women, rather than men, from marrying free or enslaved blacks.³⁸ The largest number of Afro-English children in the colony at this time were the offspring of unions between black slaves and English servants, with one-quarter to one-third being born to those women servants.³⁹ Thus, in 1691, the colony enacted one of the earliest anti-miscegenation laws prohibiting marriage between free English women or men and “negroe, mulatto, or Indian” men or women.⁴⁰ That statute also mandated that a child of an unmarried English woman and an African-descended man would become an indentured servant until the age of 30. The mother, if free, would be fined and, if an indentured servant, be consigned to five additional years after the expiration of her current term of service.⁴¹

LIFE AFTER SERVITUDE: WHAT IS FREEDOM?

Once free, Elizabeth married William Grinstead.⁴² On July 21, 1659, shortly after the General Assembly’s judgment, the administrator of

³⁵ Kathleen M. Brown, *Good Wives, Nasty Wenches, and Anxious Patriarchs: Gender, Race, and Power in Colonial Virginia* (Chapel Hill: University of North Carolina Press, 1996), 132–35.

³⁶ Hening, 1823, 2: 133. ³⁷ *Ibid.*, 2: 168.

³⁸ Act XVI of 1691, “An Act for suppressing outlying slaves” bans marriage of free “white” men or women “with negroe, mulatto, or Indian man or woman bond or free.” *Ibid.*, 3: 87.

³⁹ Berlin, 1998, 44–45. ⁴⁰ Hening, 1823, 3: 87. ⁴¹ *Ibid.* ⁴² Billings, 1975, 168.

Mottrom's estate *transferred* the "maid servant" Elizabeth Key, belonging to the Mottrom estate, and now the wife of William Grinstead, to Grinstead.⁴³ "Thus, she was protected against anyone who might make a legal claim against her as [either] a servant or slave."⁴⁴ Under the English doctrine of coverture Elizabeth's legal identity upon marriage at English common law merged with that of her husband.⁴⁵ Any property or earnings she possessed became the property of her husband, unless she protected them through a prenuptial agreement or contract.

According to witness testimony at her trial, Grinstead was the father of Elizabeth's two children.⁴⁶ While the inventory of the Mottrom estate lists only one infant son, the records are silent about the first son's whereabouts. Because uncertainty about the legal status of Elizabeth and her infant son was an impediment to their marriage, Grinstead had a keen personal interest in Elizabeth's lawsuit.

Elizabeth's marriage to William Grinstead seems to be one of the few recorded marriages between an Englishman and a free woman of African descent during the seventeenth century. One possible explanation is that, unlike free Englishwomen, the colonial law imposed special burdens on free African-descended women. For example, a 1642 law taxed the labor of African-descended women, but not English women, without regard to the race of the woman's husband.⁴⁷ Thus, marriage to a free woman of color automatically increased the tax burden of the family. The financial burden colonial Virginia's tax laws placed on free black and mixed-race women may have decreased their chances of marrying, and explain why, despite an equal sex ratio between African-descended women and men, many free black and mixed-race men, at least on the eastern shore, married English women.⁴⁸ Because the General Assembly did not

⁴³ Testimony of Elizabeth Newman. Ibid.

⁴⁴ W. Preston Haynie, "African-Americans: Obstacles to Freedom," *Bulletin of the Northumberland County Historical Society* 33 (1996): 60.

⁴⁵ Lindsay Moore, "Women and Property Litigation in Seventeenth-Century England and North America," in *Married Women and the Law: Coverture in England and the Common Law World*, edited by Tim Stretton and Krista J. Kesselring (Montreal: McGill-Queen's University Press, 2013).

⁴⁶ William Grinstead, a few years younger than Elizabeth, was a farmer and former indentured servant in the Mottrom household. Testimony of Elizabeth Newman. Billings, 1975, 167.

⁴⁷ Act I, Church Government. Hening, 1823, 1: 240, 242.

⁴⁸ Berlin argues that prominent free black males on the eastern shore of Virginia married white women during the mid-seventeenth century without incident, but there are no reports of marriages between white men and black women. Berlin, 1998, 44. Breen and Innes mention interracial marriages, but none involving black women and white men.

squarely address Elizabeth's legal claim that she, by virtue of her father, was an English subject, it is unknown whether the 1642 statute applied to her. Presumably as a free Englishwoman Elizabeth would be exempt from the taxing statute, and, if so, then she would have been luckier than most free women of some African ancestry. As the number of English indentured servants decreased, the number of Africans entering the colony increased.⁴⁹ With the increase in the African and African-descended population in the colony, other legal limitations were imposed on free people of color. By 1705 Virginia had codified permanent servitude enacting the first comprehensive slave code.⁵⁰

When John Grinstead died in 1661, Elizabeth married John Parse (Peirce), an English widower.⁵¹ At his death, Parse/Peirce left Elizabeth and her two sons, William and John Grinstead, 500 acres of land.⁵² Elizabeth, unlike most African-descended women in the Virginia Colony, probably lived in modest prosperity.

A larger question is whether Elizabeth thought of herself in racialized terms. During the seventeenth century, notions of race, as we know it today, were in their formative stage. Instead, words like "English" and "Christian" operated as exclusionary categories in the way that the racial category "white" has operated in the United States since the late eighteenth century. Being a Christian, for example, was an early surrogate for what we today call whiteness. This might explain why Elizabeth in her pleadings described herself not only as the daughter of an English subject, but also as a practicing Christian. There were very few persons of African descent in the colony when Elizabeth was born in 1630. As more of them became Christians, the determination of community acceptance as "white" relied more on ancestry or skin tone.⁵³ By the time of her freedom suit "most planters appeared to presume people of African descent were slaves ... [but] no law yet enshrined African slavery ... in Virginia, and the laws that referred to black people were scattered and

T. H. Breen and Stephen Innes, *"Myne Owne Ground": Race and Freedom on Virginia's Eastern Shore, 1640–1676* (New York: Oxford University Press, 1980), 83–84, 88.

⁴⁹ For example, two thousand Africans entered Virginia during the 1680s, and by 1690 that number had doubled. Berlin, 1998, 55.

⁵⁰ Benjamin, 2009, 399. ⁵¹ Northumberland Co. Rec. Bk 1666–72. Haynie, 1996, 60.

⁵² "Grinstead (sometimes spelled Grinstead) remained a Northumberland County name for 150 years." Ibid.

⁵³ John Tehranian, "Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America," *Yale Law Journal* 109, no. 4 (2000): 830–31.

miscellaneous.”⁵⁴ The terms *negro* and *mulatto* identified people with some African ancestry, and African ancestry was linked to slavery and a debased standing in the eyes of Europeans. If given a choice, it seems unlikely that Elizabeth would think of herself in racialized terms, that is, as black, but the unanswered question is whether her community thought of her that way.

However Elizabeth regarded herself, once free, she married two English settlers. She did so strategically: both unions preserved her status in the colonial society in which she lived, solidified her tenuous standing as an English subject, and brought her closer to whiteness. Nevertheless, it is highly unlikely that she, and probably her Afro-English sons, were treated equally under the colony’s laws because of their partial African ancestry. Virginia, one of the first British mainland colonies to formulate racial definitions, did not attempt to statutorily define the legal categories “negro” and “mulatto” until the early eighteenth century.⁵⁵ The colony, and later the State, changed the definition of “white” several times over the centuries. For example, in 1705 one of the earliest statutes using racial terms, defined a “mulatto” as “the child of an Indian, or the child, grandchild, or great grandchild of a Negro.”⁵⁶ Under this statute, assuming Elizabeth’s mother was a “negro” and not a “mulatto,” Elizabeth’s grandchildren would be considered mixed-race even if their mother was classified as “white.” The definition of whiteness was and remains fluid. A 1785 law, for example, defined anyone with one-eighth or less black ancestry as legally “white.”⁵⁷ This means that Elizabeth’s later descendants, assuming they married “white” spouses, now were considered “white” by law.

⁵⁴ Berlin, 1998, 32.

⁵⁵ An Act Concerning Servants and Slaves, Act of Oct. 1705 (year enacted). Hening, 1823, 3: 447–62. “Mulatto defined as child, grandchild, or great-grandchild of Negro (and presumably a white) or child of Indian (and presumably a white).” Higginbotham Jr., A. Leon and Barbara K. Kopytoff, “Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia,” *Georgetown Law Journal* 77, no. 6 (1989): 1967 n.4.

⁵⁶ Higginbotham and Kopytoff, 1989, 1977. ch. IV, 3 Laws of Va. 250, 251. Hening, 1823, 1: 250–51.

⁵⁷ Higginbotham and Kopytoff, 1989, 1978. ch. LXXVIII, 12 Laws of Va. 184. Hening, 1823, 1: 184. The 1785 law which defines who is a “mulatto” briefly made it easier for individuals with some African ancestry to be classified as “white.”

CONCLUSION

On March 4, 1833, barely 200 years after Elizabeth's birth, the Northumberland Board of Commissioners appointed a John Grinstead to serve on a committee to determine the willingness of free persons of color in the county to immigrate to West Africa.⁵⁸ The American Colonization Society, formed in 1817 by both proponents and opponents of African slavery in the United States, encouraged free African-descendants to move to coastal colonies in West Africa.⁵⁹ During the 1820s and 1830s support for the colonization movement was strong among slave owners in the Virginia Piedmont area, especially after the 1831 Nat Turner rebellion.⁶⁰

Grinstead was very likely a third or fourth generation descendant of Elizabeth Key and William Grinstead. According to the 1830 US Census records, John Grinstead, his wife and three daughters were "white." Grinstead owned thirty-one slaves, which might explain his interest in the colonization movement.⁶¹

Elizabeth's route to freedom meant her total assimilation into the English settler society in which she was born.⁶² Her freedom suit and life after freedom illustrate this point.

⁵⁸ Northumberland Co. Order Bk 1830–35, 282–83. Haynie, 1996, 66–67. The General Assembly passed an act authorizing the establishment of county colonization societies to encourage persons of African descent to establish colonies in Africa. 1833 Va. Acts 14–15.

⁵⁹ Douglas R. Egerton, "'Its Origin Is Not a Little Curious': A New Look at the American Colonization Society," *Journal of the Early Republic* 5, no. 4 (1985): 465.

⁶⁰ Ellen Eslinger, "The Brief Career of Rufus W. Bailey, American Colonization Society Agent in Virginia," *The Journal of Southern History* 71, no. 1 (2005): 44–46.

⁶¹ Bureau of the Census, "Population schedules of the fifth census of the United States, 1830, Virginia: Microform" (Washington, DC: United States National Archives and Record Service, 1969), FM 19, roll 201.

⁶² Ira Berlin has argued, "The fluidity of colonial society, the ill-defined meaning of slavery, and the ambiguous notions of race allowed Atlantic creoles [like Elizabeth] to carve a place for themselves in the Chesapeake and occasionally achieve a modest prosperity, despite the growing weight of discriminatory legislation." Berlin, 1998, 41.